

Fordham International Law Journal

Volume 41, Issue 3

2018

Article 6

Where is the Morality? Moral Rights in International Intellectual Property and Trade Law

Elizabeth Sche?re?*

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ESSAY

WHERE IS THE MORALITY? MORAL RIGHTS IN INTERNATIONAL INTELLECTUAL PROPERTY AND TRADE LAW

*Elizabeth Schéré**

ABSTRACT

The concept of moral rights - that is, whether an author has personal rights over his work that go beyond property rights - created tensions between the European Union and the United States during the negotiations of international intellectual property agreements. This paper examines that conflict through the prism of international copyright and trade law, specifically the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). As trade relations have been subsumed by international copyright law, the time seems appropriate to revisit the French-born legal notion of moral rights. Although it has been excluded from the TRIPS agreement (much to the United States' relief), this issue has resurfaced in today's globalized and digital world, as authors may acquire rights that they do not have at home by crossing borders. This paper delves into the power imbalance between economic and personal rights and the legal and political ramifications of these rights on the international stage.

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* Elizabeth Schéré received her L.L.B from the University Paris II Assas and holds an L.L.M in American Law from Boston University and an L.L.M in International Private Law from the Fletcher School of Law and Diplomacy. The Author specializes in International Trade Law and Intellectual Property and writes and consults on these matters.

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I. INTRODUCTION

Moral rights were excluded from the Trade Related Aspects of Intellectual Property Agreement (“TRIPS”) as a result of the United States’ political and economic pressure on other signatories during the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”) in 1994.¹ The United States took the point of view that personal incentives were incompatible with a primarily economic agreement that was meant to encourage and facilitate trade. As culture is commodified, issues of ownership, protection, and compensation are bound to arise. At the international level, Professor Graeme B. Dinwoodie posited that, “the incorporation of intellectual property agreements within trade mechanisms . . . might deprive intellectual property policymaking of the rich palette of human values that historically has influenced its formulation.”² Although Dinwoodie is not referring to the traditional divide in copyright law between personal and property rights, his reflection brings up a salient question in this inquiry: what role do moral rights, a “humanist” value, play on the international stage? Should they be considered to be a baseline right that is protected by multilateral trade and intellectual property agreements?

To answer the question, this Essay will first define moral rights and examine the ways in which they exemplify the diverging schools of thought regarding copyright law. This is followed by a look at

1. The General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

2. Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 CHI.-KENT. L. REV. 993, 1004 (2002).

moral rights on the international agreement stage. Specifically, this Essay attempts to ascertain whether moral rights have played a role in the harmonization imperatives of international intellectual property rights.

II. PERSONALITY AND PROPERTY: THE DICHOTOMY OF MORAL RIGHTS

A. Moral Rights on the Old Continent

The moral rights doctrine originated in France during the 19th century.³ *Le Droit d'Auteur* (author's rights) recognizes that the author has a right over his creation that goes beyond exploitative rights (the property rights approach): these rights are personal, non-pecuniary, and inseparable from human rights (the natural rights approach).⁴ According to this view, a person is born with natural rights, though not necessarily with property rights. The former protects the person, the latter what he owns. These moral rights have been accepted and adopted within every civil law system within the European Union. These general principles include the right of paternity or attribution, and the right of integrity.⁵ The right of paternity gives the author the right to choose whether to include his name in the work, or to publish it anonymously or under a pseudonym.⁶ This right, which is directly linked to the persona of the author, his inner-self, cannot be licensed or assigned away.⁷ In other words, an employer who hires the author to create a work cannot avail himself of this right, though they may own the copyright to the work.⁸ The right of integrity, on the other hand, protects the author's work from any kind of modification, distortion or mutilation.⁹

3. Noreen Wiscovitch Rentas, *Moral Rights Exclusion in the North American Free Trade Agreement and the General Agreement on Tariff and Trade: A Legal Proposal for the Inclusion of Moral Rights in Future Free Trade Agreements in Latin America and the Caribbean*, 35 REV. DER. P.R. 97 (1996).

4. DIEGO ESPÍN CÁNOVAS, MANUAL DE DERECHO CIVIL ESPAÑOL, DERECHOS REALES, VOLUME 2, 392-398 (7th ed. 1985).

5. This Essay will not discuss moral rights as interpreted by the English/Commonwealth common law system.

6. Arathi Ashok, *Moral Rights – TRIPS and Beyond: The Indian Slant*, 59 J. COPYRIGHT SOC'Y U.S.A. 697, 700 (2013).

7. See *id.*

8. See *id.*

9. The Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Jul. 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The Berne Convention for the

The copyright statutes currently in force in France, Germany, and Italy contain provisions protecting the rights mentioned above, as well as the right of disclosure, whether the author decides to publish the work and make it public or keeps it private, and withdrawal.¹⁰ Moral rights, as they are understood in Continental or mainland Europe, are inalienable and fundamental rights that belong to the author of each work.¹¹ In other words, the underlying final justification for moral rights is linked to the individual and the protection of his personhood.

B. Moral Rights in the United States

The US Constitution states that Congress has the power to “[p]romote the progress of Science and useful Arts.”¹² Yet this provision does not go far enough. Where copyright is concerned, there needs to be a greater balance between the author’s rights and congress’s interest in the social and economic advancement of these domains. Specifically, the balancing approach needs to be defined within specific limits, measuring society’s economic needs against the author’s moral and property rights.¹³ Despite its obligations under the Berne Convention and its role as a vocal global champion of intellectual property rights, the United States does not protect moral rights to the same extent that its European counterparts do.¹⁴ Instead, the United States grants narrow moral rights to authors through the Visual Artists Rights Act of 1990 (“VARA”), and also protects

Protection of Literary and Artistic Works originally was signed September 9, 1886, and was revised in 1908, 1928, 1948, 1967, and 1971. The convention went into force in the United States on March 1, 1989. The implementing legislation also went into effect on March 1, 1989. See generally Deborah Ross, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights*, 68 N.C. L. REV. 363 (1990).

10. See Wiscovitch Rentas, *supra* note 3, at 104.

11. *Id.* However, not all European countries extend moral rights protection beyond the term of the copyright. Germany ties moral rights protection to copyright protection in the sense that moral rights protection ends when copyright protection ends. Conversely, in France, inalienability is meant to apply even after the author’s copyright ends.

12. U.S. CONST. art. I, § 8, cl. 8.

13. See Wiscovitch Rentas, *supra* note 3, at 104. A balancing approach would ensure that authors are not proverbially sacrificed in the name of the aforementioned progress. This line of thought posits that only protecting the work and not the author hurts the potential for more works in the long run.

14. Peter K. Yu, *Moral Rights 2.0*, 1 TEX. A&M L. REV. 873, 875 (2014).

authors from trademark infringement under the Lanham Act.¹⁵ In other words, moral rights are not independently considered in the United States, as they are in Continental Europe, but are instead cloaked in the “guise of other legal theories” such as unfair competition, invasion of privacy, defamation, and breach of contract.¹⁶ In addition, the United States offers an extensive and non-exhaustive fair use doctrine, which acts as a powerful defense against a copyright owner’s claim.

As this chapter has demonstrated, there are two conflicting approaches to moral rights. On one hand, Continental Europe considers moral rights to be intrinsically linked to copyright law. On the other hand, the United States accepts moral rights, but at arm’s length, like an extrinsic feature. These conflicting views, as this paper will demonstrate, are magnified on the international treaty stage.

III. COMPLIANCE AND HARMONIZATION: MORAL RIGHTS IN INTERNATIONAL COPYRIGHT LAW

A. The Berne Convention

International copyright law was enacted by the Berne Convention for the Protection of Literary and Artistic Works of 1886. This text established the concept of an author’s exclusive rights.¹⁷ It instituted a minimum standard that all member countries were required to recognize as well as national treatment.¹⁸ The latter is the foundational principle of the Convention (and a trade law tenet), and signifies that Berne signatories must grant authors the same protection they accord to their own nationals.¹⁹ Moral rights were only recognized by the Convention in 1928, via an amendment that added Article 6*bis*.²⁰ The latter’s addition to the Convention halted and

15. Brandi L. Holland, *Moral Rights Protection in the United States and the Effect of the family Entertainment and Copyright Act of 2005 on U.S. International Obligations*, 39 VAND. J. TRANSNAT’L L. 217, 233 (2006). 15 U.S.C. § 1114 (2005). 15 U.S.C. § 1125(a) (2012).

16. Monica Killian, *A Hollow Victory for the Common Law? TRIPS and the Moral Rights Exclusion*, 2 J. MARSHALL REV. INTELL. PROP. L. 321 (2003).

17. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 16-17 (1988).

18. *Id.*

19. *Id.* Berne Convention, *supra* note 9, art. 5.

20. Berne Convention, *supra* note 9. “Independently of the author’s economic rights...the author shall have the right to claim authorship of the work and to object to any distortion,

complicated the United States' willingness to accede to the Convention. From Congress's utilitarian-minded standpoint, the natural approach to moral rights would conflict with the property-based approach to copyright enshrined in Article 1, Section 8 of the Constitution. However, the United States finally joined the Convention in 1988, largely because it was in their interest to have their intellectual property works protected abroad via the national treatment principle and to be in a position to influence a strong protection of their works abroad.²¹ However, the United States successfully avoided the issue of moral rights by enacting the Berne Convention Implementation Act of 1988, which stated that the Convention was not "self-executing in that existing law satisfied the United States' obligations in adhering to the Convention."²² As a result, the U.S. created VARA, which grants moral rights to artists to appease the domestic lobby and to ease the latter's criticism for not providing a higher standard of protection to its authors.²³ However, considering how narrowly VARA is defined (it only protects a specific type of artists, "visual artist", and only protects a specific type of art, "visual art"), and how many exceptions are in place ("work made for hire" and "fair use") in U.S. Copyright law, it is surprising that the United States has been able to shield itself from the European-led push for moral rights in international agreements.²⁴ Conversely, considering the technological advancements of the past thirty years, the intellectual property shake ups caused by the digital revolution (i.e. the borderless nature of the internet vs. the territorial nature of copyright), and a hungry global market for US audiovisual services and products, Congress may have to reconsider its position as the winds of copyright change.

B. TRIPS Agreement

It is evident from the United States' reluctance to adhere to the Berne Convention, and its subsequent avoidance of the moral rights provision, that international copyright harmonization, with regard to

mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

21. *Id.*, arts. 5(1), 5(3). See generally Burger, *supra* note 17.

22. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (citing S. Rep. No. 100-352, at 9-10 (1988)).

23. See Killian, *supra* note 16, at 330.

24. 17 U.S.C. §106(a).

this subject, is currently off the negotiation table.²⁵ In fact, the United States was able to convince the other members of the World Trade Organization (“WTO”) to exclude Article 6*bis* of the Berne Convention from the Trade Related Aspects of Intellectual Property Agreement (“TRIPS” Agreement), which incorporates the substantive provisions of the Berne Convention.²⁶ Article 9.1 of the TRIPS Agreement explicitly states that, “*Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of the Berne Convention or of the rights derived therefrom.*”²⁷ To some, this exclusion seemed surprising, since the United States had signed the Berne Convention and incorporated exhaustive moral rights in VARA.²⁸ However, this paper agrees with Professor Dinwoodie that the internationalization of intellectual property is “subsumed within the broader apparatus of trade relations.”²⁹ The potential for harmonization of moral rights is directly related to how much protection nations want to grant and receive. For example, the United States purposefully excluded Article 6*bis* to ensure that WTO members could not use the dispute settlement process against them with regard to this subject.³⁰ To include this provision would have given moral rights teeth since the Berne Convention provides no enforcement mechanism, meaning signatories may be penalized for violating their obligations.³¹ However, this paper wonders how much the addition of Article 6*bis* into TRIPS would affect international trade? Was the United States worried that Art. 6*bis*’s “honor and reputation” requirement might be used as an affirmative defense? Similar to the “public morals” general exception defense under Article XX of GATT?³² Unlikely, since the exceptions to TRIPS are clearly stated in the agreement and if Congress was that concerned it could have fought to include moral

25. See Yu, *supra* note 14, at 875-76.

26. *Id.* at 876.

27. *Id.*

28. *Id.*

29. See Dinwoodie, *supra* note 2, at 1003.

30. See GATT, *supra* note 1.

31. See Dinwoodie, *supra* note 2, at 995, 1005-06.

32. See GATT, *supra* note 1, art. XX. (“Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; . . . (f) imposed for the protection of national treasures of artistic, historic, or archeological value . . .”).

rights in the exceptions section of that agreement.³³ In addition, in the US legal system, WTO law appears to have no direct effect, meaning its provisions cannot be invoked by the parties before a court of law. Moreover, even when an international agreement does have direct effect, it can never claim supremacy because a federal statute may override the international agreement.³⁴

Based on the national legal procedure explained above, it appears that including moral rights in the TRIPS agreement would not adversely affect the United States. However, its exclusion from TRIPS, and other treaties such as NAFTA, may provoke an unbalance of rights and obligations among the parties involved – as we will see in the following section.

IV. IT'S COMPLICATED: THE EFFECTS OF INTERNATIONAL COPYRIGHT AGREEMENTS ON MORAL RIGHTS

A National Treatment

National treatment is a fundamental principle in all five major multilateral treaties concerning copyright: the Berne Convention, the Rome Convention, the TRIPS Agreement, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty (“WPPT”).³⁵ This principle is convenient for countries as it “allows a treaty member and its courts to apply their own law – the law they’re familiar with.”³⁶ That being said, the *nec plus ultra*, the highest attribute of national treatment is its “substantive bite,” as it requires parties to the agreement to extend protection to non-nationals on the

33. For example, Article 13 of TRIPS states that, “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

34. See generally Andrew Guzman & Joost H.B. Pauwelyn, *International Trade Law*, (2d ed. 2012). . The U.S. implemented the results of the Uruguay Round in the Uruguay Round Agreements Act (URAA), P.L. 103-465. The statute states under Sec. 102(c) that no WTO provision can operate to change prior or subsequent US law.

35. Ulrich Loewenheim, *The Principle of National Treatment in the International Conventions Protecting Intellectual Property*, in PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD: LIBER AMICORUM JOSEPH STRAUS 593 (Wolrad Prinz zu Waldeck and Pyrmont, Martin J. Adelman, Robert Brauneis, Josef Drexler & Ralph Nack, eds. 2009).

36. *Id.*

same terms as they do their nationals.³⁷ The potential issue is that the exclusion of moral rights from bilateral and multilateral agreements creates an imbalance between the relevant parties. For example, under NAFTA, article 6*bis* is also excluded.³⁸ Therefore, parties from Mexico and Canada would not be able to evoke moral rights in the United States but the US party would be able to evoke these rights in these countries, who both have moral rights established in their national legal system.³⁹ Yet, it could be that this “double standard” resulting from national treatment is not widely considered problematic by signatories of international intellectual property agreements. Robert Brauneis, Professor of Law at George Washington University Law School, found that while national treatment has been featured in over 200 GATT complaints, it has featured in fewer than twenty TRIPS complaints; none of those complaints involved copyright or related rights.⁴⁰ This may be because the states involved in these agreements may or may not offer copyright protection that exceeds minimum requirements imposed by them. And, if additional protection is offered, it may be offered by many other countries, thus limiting the divergence of a national treatment rule from that of a rule of material reciprocity.⁴¹ However, this latter argument may be a double-edged sword because “material reciprocity is an abrogation of the national treatment given to protectable works of expression.”⁴² For example, in *Huston v. La Cinq*⁴³, La Cour de cassation (the French Supreme Court) had to decide whether to apply US copyright law or French copyright law, when the John Huston estate sued the Turner Corporation (which owned the economic rights to the film) as well as the French

37. *Id.*

38. See North American Free Trade Agreement (NAFTA), Dec. 17, 1992, U.S.-Can.-Mex. [hereinafter NAFTA], vol. I, pt. 4, ch. 17, Annex 1701.3. (“Notwithstanding, Art. 1701(2)(b), this Agreement confers no rights and imposes no obligation on the United States with respect to Article 6*bis* of the Berne Convention, or the rights derived from that Article”).

39. See Rentas, *supra* note 3, at 23.

40. See generally Robert Brauneis, *National Treatment in Copyright and Related Rights: How Much Work Does it Do?*, GW LAW FACULTY PUBLICATIONS & OTHER WORKS, PAPER 810 (2013).

41. *Id.*

42. See generally Stephen Frase, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759 (1997).

43. *Huston v. La Cinq*, Cour de cassation, première chambre civile [Cass. [supreme court for judicial matters], 1e civ., May 28, 1991, Bull. civ. I, No.172 (Fr.)

television channel, La Cinq, regarding the rights to show a film. The Turner Corporation wanted US law to apply, since US copyright law would not recognize moral rights in this specific case, whereas the Huston estate argued for French copyright law, which would have applied the moral right of integrity. The Cour de cassation, basing its decision on national legislation, which guarantees moral rights for all authors of creative works, regardless of nationality, sided with Huston's heirs.⁴⁴ Based solely on the principle of material reciprocity (which French law does apply to copyright in general),⁴⁵ the French court could have refused to apply French law in order to refuse moral rights to Huston's work.

In her article *Moral Rights of Artists in an International Marketplace*, Leslie A. Pettenati laments the lack of uniform protection of moral rights in international agreements, positing that the issue is bound to grow as a result of new technologies.⁴⁶ This paper was published in 2000, before the ascension of OTTs (over-the-top media services) such as SVODs (subscription video-on-demand) and new media platforms (e.g. the smartphone). As a result, an author's control over the dissemination and potential manipulation of his or her work is becoming unmanageable and "forum shopping" for moral rights is not a far-fetched possibility, especially considering the fact that international intellectual property agreements remain, perhaps purposely, vague on choice of law methods.⁴⁷

B. The Minimum Standard

As mentioned above, multilateral agreements impose minimum requirements. These are known as "minimum standards." The Berne Convention, the TRIPS agreement, as well as the other copyright agreements mentioned, have agreed to certain minimum standards in an attempt to create, on an international scale, baseline protection (i.e. harmonization). For example, the Berne Convention, applicable to TRIPS, states that the duration of protection "must be granted until

44. *Id.*

45. See Loi N. 64-689 du 8 juillet 1964 sur l'application du principe de réciprocité en matière de protection du droit d'auteur.

46. Leslie A. Pettenati, *Moral Rights of Artists in an International Marketplace*, 12 PACE INT'L L. REV. 425 (2000).

47. *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* (Am. Law. Inst. 2008).

the expiration of the 50th year after the author's death."⁴⁸ A country may choose to offer additional protection, such as the United States.⁴⁹ Would it be necessary to include moral rights into the "minimum standards"? As noted above, states have either already embraced these rights in their original format (i.e. copyright law), prior to signing these international agreements, or they have incorporated them in their derivative, "remake" format, under contract or tort law – and apart from the United States, most Berne-signatories have incorporated the minimum standard for moral rights into their national legislation.

Advances in technology and digital media, as well as globalization, have changed the face of copyright. As Professor Dinwoodie noted, trade law has now absorbed intellectual property, shifting its essence of balancing economic and personal interests in favor of the former.⁵⁰ It should therefore come as no surprise that the TRIPS agreement, the IP section of the World Trade Organization, would not include moral rights in its minimum standards of protection, although the European Union negotiated in its favor. The United States remains the world's largest bargaining power. This paper advances that even an additional protocol or agreement on moral rights within the confines of WIPO or another intellectual property organization would not lead to harmonization in this field. For purely economic reasons, the United States will continue to oppose transposing the European model of moral rights into its national copyright legislation, unless a strong argument is made for moral rights as an advantage to international trade.

V. CONCLUSION

Harmonization is not unification. It does not lead to a uniform set of agreed rules but seeks to coordinate various legal systems by creating minimum requirements. Harmonization facilitates the dissemination of copyrighted works by providing transparency and protection within the countries involved. Moral rights are currently not on the ballot for harmonization. Even in Europe, the birthplace of moral rights, the EU Commission does not see any need for

48. Berne Convention, *supra* note 9, art. 7 § 1.

49. See 17 U.S.C. § 302 (2012) (states that United States grants copyright protection for seventy years after the death of an author).

50. See *generally* Dinwoodie, *supra* note 2.

harmonization, and it is resisting the demands of some European academics for community-wide regulation of moral rights.⁵¹ This lack of interest on the part of the Commission is even more interesting given that it has routinely criticized the United States for its lack of commitment to the cause of moral rights in copyright law.⁵² In most international copyright agreements, the rights that are being harmonized are procedural more than substantive. Furthermore, none of them are related to personal rights. Rights that are philosophically and historically linked to a country's evolution are difficult to harmonize, as they imply more than a procedural modification. For that reason alone, one can understand the Commission's deference. That being said, the author's moral rights are not in any danger in the European Union. In the United States, where these rights are reserved to a selected few (VARA), it may be time for Congress to reassess their stance. As mentioned above, the face of copyright is changing, it is global and digital, and authors may start "forum shopping" for moral rights, such as it already exists for patents.

51. See Cyrill P. Rigamonti, *Destructing Moral Rights*, 47 HARV. INT'L L. J. 353, 358 (2006).

52. *Id.*